BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDDIE J. HAGLER Claimant VS. **RAMCO BUILDING MAINTENANCE** Respondent AND **EMPLOYERS MUTUAL CASUALTY CO.** Insurance Carrier	)	Docket No. 1,031,704

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the October 11, 2007, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Chris A. Clements, of Wichita, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent and its insurance carrier.

The Administrative Law Judge (ALJ) found that claimant established that it was more probably true than not true that he suffered an injury by accident that arose out of and in the course of his employment with respondent and that appropriate notice of accident was timely provided to respondent. Accordingly, the ALJ found claimant was entitled to medical care; medical expenses incurred to date, including medical mileage and prescriptions; and temporary total disability compensation beginning July 13, 2007, and continuing until claimant is released to substantial and gainful employment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 23, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's finding that claimant suffered personal injury by accident arising out of and in the course of his employment and that claimant provided respondent with timely notice of the alleged accident.

Claimant requests that the Board affirm the ALJ's preliminary hearing Order.

The issues for the Board's review are:

(1) Did claimant suffer personal injury by accident arising out of and in the course of his employment with respondent?

(2) Did claimant provide respondent with timely notice of the alleged accident?

(3) Did claimant suffer an intervening accident and injury that would relieve respondent of its duty to provide benefits?

FINDINGS OF FACT

Claimant worked for respondent, a building maintenance business. Respondent had a contract with York International (York) to supply it with a laborer to run their scrubber. The scrubber was power-operated and had a steering wheel with power steering. Claimant admitted that it did not take much force to turn the steering wheel of the scrubbing machine. Although he is right-hand dominant, he would steer the machine with his left hand and arm.

About July 2006, while performing this job at York, claimant began to experience pain in his left arm and shoulder. He first complained of his condition to Fred Wise, a York employee who was supervising him. Mr. Wise told claimant to tell his supervisor at respondent, Matt Brewer. When claimant told Mr. Brewer, he said that he would bring it up to Chris Hoose, claimant's boss. Claimant also testified that one time he was speaking with Mr. Hoose on the telephone and he brought up the fact that his arm was hurting and he might go see a doctor. Claimant did not fill out any paperwork concerning a work-related injury, and he continued to work.

Claimant finally went to see a nurse in York's plant about the complaints with his left elbow and shoulder. He said that the nurse noticed that his elbow had a lump on it. The nurse gave him a cream to use, as well as an Ace bandage. A couple of weeks went by and he continued to get worse. He went to the nurse at York a second time. The nurse commented that there was obviously something wrong with his elbow and asked claimant if respondent had workers compensation insurance. Claimant had previously overheard a conversation between two coworkers to the effect that respondent did not have workers

compensation insurance, so he answered the nurse, "I don't think so."[1] The nurse gave claimant more cream and an Ace bandage to wrap his elbow.

Claimant said he did not go back to respondent again to request medical treatment. He said that when he showed up at the York plant to work on October 26, 2006, he was told by the security guard that he was not welcome in the plant. Claimant called Mr. Hoose, who told him he was fired for lying to York by saying respondent did not have workers compensation insurance.

Claimant's Application for Hearing was filed November 1, 2006. He claimed injuries to his left arm caused by repetitive use, giving a date of accident of "Approx. 7/1/06 and each and every working day thereafter through 10/26/06."[2]

Claimant was eventually treated for his left elbow and shoulder problem by Dr. Pat Do, whom he first saw on February 13, 2007. Dr. Do diagnosed him with rotator cuff syndrome with possible rotator cuff tear, internal impingement, and left elbow lateral epicondylitis. Dr. Do sent claimant to physical therapy but on July 13, 2007, performed a lateral epicondyle release on claimant's left elbow. Dr. Do has opined that within a reasonable degree of medical probability, claimant's left elbow and shoulder problems were causally related to his repetitive work injury.

On or about May 16, 2007, claimant was involved in a bicycle accident in which he broke his left wrist and his right elbow. He was treated for those injuries by Dr. Anthony Pollock.

Christopher Hoose is the chief financial officer of respondent. He confirmed that the machine operated by claimant at York was power-operated and had power steering. Mr. Hoose said the machine is very easy to turn and is similar to operating a motor vehicle. He said that claimant's main job was to operate the scrubbing machine, but if he finished scrubbing all the floors he would assist the grounds crew workers.

Mr. Hoose testified that claimant never reported a problem with his arm. He first learned that claimant had been to see the nurse at York on October 25, 2006, when he received a copy of an email concerning whether respondent had workers compensation insurance. Claimant's supervisor, Mr. Brewer, signed an affidavit stating that claimant had never told him about a work-related injury.

In a letter dated October 31, 2006, counsel for claimant informed respondent that claimant was alleging a series of accidents beginning "[a]pproximately July 1, 2006 and

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[1] P.H. Trans. at 10.

[2] Form K-WC E-1, Application for Hearing filed Nov. 1, 2006.

[continuing] each and every working day thereafter through 10/26/06."[3] Claimant filed an Application for Hearing with the Division of Workers Compensation on November 1, 2006.[4]

PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2006 Supp. 44-508(g) states: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.[5]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the

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[3] Notice of Intent letter dated Oct. 31, 2006, from Chris A. Clements to respondent, filed with the Division of Workers Compensation Nov. 1, 2006.

[4] Form K-WC E-1, Application for Hearing filed Nov. 1, 2006.

[5] *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002), *cf. Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

[6] K.S.A. 2006 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2006 Supp. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the

[8] *Id.* at 278.

> date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

"A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition."[9]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[11]

ANALYSIS

This is a dispute about whether claimant personally informed Mr. Hoose that he injured his arm at work. However, there is no dispute that Mr. Hoose received the email from York that led to claimant's termination. That email alerted respondent to claimant's alleged work-related arm injury. Furthermore, claimant is alleging a series of accidents through to his last day worked. An authorized treating physician did not take claimant off work or restrict claimant from performing the work he was doing for respondent before he was terminated. Therefore, claimant's date of accident is the date which he gave written notice to respondent. At the latest, written notice was given to respondent by a Notice of Intent letter from claimant's attorney dated October 31, 2006, which was sent by certified mail and signed for by "Chris Hoose" on November 6, 2006.[12] In addition, both the email from York and claimant's Application for Hearing provided respondent with timely notice of claimant's alleged series of accidents.

Dr. Do related claimant's injury to his work with respondent. There is no contrary expert medical opinion testimony. Respondent argues Mr. Hoose's testimony concerning how easy the scrubber machine is to operate is contradictory evidence of causation. In addition, respondent argues this evidence caused Dr. Do to recant his original causation opinion. However, Dr. Do said he would be willing to review a videotape of the floor scrubbing machine in operation and "[s]uch information may or may not change the

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[9] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, Syl. ¶ 2, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[10] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[11] K.S.A. 2006 Supp. 44-555c(k).

[12] P.H. Trans., Cl. Ex. 6.

opinions rendered in this evaluation."[13] While this letter weakens Dr. Do's original causation opinion, it does not constitute a contrary opinion and it does not mean that Dr. Do has changed his opinion. The greater weight of the evidence presented to date is that claimant's left arm injury is work related.

CONCLUSION

(1) Claimant suffered a series of accidents arising out of and in the course of his employment with respondent each working day through his last day worked.

(2) Claimant gave respondent timely notice of accident.

(3) Respondent has failed to prove that claimant's intervening injury should relieve respondent of liability for this claim.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 11, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2007.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[13] P.H. Trans., Resp. Ex. 1.